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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 63,720

JAMES RAY ROTENBERRY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent accepts petitioner's statement of the case and facts.

II ARGUMENT

ISSUE PRESENTED

WHETHER THE FIRST DISTRICT ERRED IN VACATING APPELLANT'S SENTENCES FOR SALE AND POSSESSION OF COCAINE.

Petitioner's argument is premised on the erroneous assertion that it is statutorily possible to commit the offense of trafficking in cocaine[1] without committing the offenses of sale[2] or possession[3] of cocaine. In support of his argument that separate convictions and sentences can be imposed for trafficking, sale and possession of contraband, petitioner misconceives the double jeopardy doctrine developed in Blockburger v. United States, 284 U.S. 299 (1932) and its progeny, and in Borges v. State, 415 So.2d 1265 (Fla. 1982).

Petitioner advances the faulty proposition that two offenses are separate if one offense requires proof of an element that the other does not. Following this proposition, petitioner argues that because trafficking requires proof of quantity, whereas sale and possession do not, each offense is separate and distinct and subject to separate penalties. This is an incorrect interpretation of law as established by the "Blockburger test." Blockburger v. United States, supra, established that where the same act or transaction constitutes a violation of two distinct

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1. Section 893.135(b)(1), Florida Statutes (1981).
2. Section 893.13(1)(a), Florida Statutes (1981).
3. Section 893.13(1)(e), Florida Statutes (1981).

statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional element which the other does not. The same offense for double jeopardy purposes does not require that two statutory offenses have the exact same elements. If all the elements of one statutory offense are included in the elements of a second statutory offense, the first is a lesser included offense of the second and both are the same offense within the double jeopardy clause.

The Borges court, citing Blockburger v. United States, explained the constitutional test for a lesser included offense:

> A less serious offense is included in a more serious one if all the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discrete and one is not included in the other.

415 So.2d at 1267. Applying the Blockburger-Borges test to the instant charges, it can readily be seen that sale and possession are less serious offenses included in trafficking. All the constituent essential elements required to be proven to establish sale and possession are also required to be proven to establish trafficking, with the additional element of quantity.

Petitioner's argument that it is statutorily possible to traffic in cocaine without possessing or selling the illegal drug was directly refuted by this Court in Bell v. State, ___ So.2d ___ (Fla. Case No. 62,002, opinion filed June 9, 1983) [8 FLW 199], rehearing denied October 11, 1983. In Bell, this

Court stated:

> [T]he Legislature has codified the distinctly different statutory offenses of sale of illegal drugs and possession of illegal drugs. Also it has determined that another offense, trafficking in illegal drugs, is committed when either or both of the offenses of sale or possession of a certain amount of illegal drugs is effected. By including sale and possession of drugs within the trafficking statute, it is apparent that the Legislature intended to facilitate trafficking prosecutions through the use of alternative methods of proof rather than attempting to provide for multiple convictions and punishments for criminal conduct which is basically unitary.

8 FLW at 200. Petitioner contends that Bell was incorrectly decided because this Court looked beyond the statutory elements to the proof adduced at trial in determining the propriety of the separate convictions for trafficking, sale and possession. Respondent submits that petitioner has misinterpreted the opinion in Bell v. State. Bell correctly applies the "statutory elements test" in reaching the conclusion that sale and possession of cocaine have the same essential constituent elements as trafficking in cocaine, and thus are tantamount to the latter offense. Indeed, the schedule of lesser included offenses, contained in the Florida Standard Jury Instructions in Criminal Cases (1981) lists sale and possession of cocaine as category 1 necessarily included offenses of trafficking in cocaine. In the Matter of Use by the Trial Courts of Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, Nos. 57,734, and 58,799 (Fla. April 16, 1981). Under these circumstances, Section 775.021(4), Florida Statutes (1981)

explicitly prohibits the imposition of separate sentences since the sale and possession are necessarily lesser included offenses of trafficking in cocaine.

Petitioner urges that the amended Section 775.021(4), Florida Statutes (1983) is controlling in the instant case and authorizes both the multiple convictions and multiple sentences imposed upon respondent. First, it should be noted that any substantive alteration of the law after the date of respondent's crime cannot be applied retroactively, because to do so would be to subject respondent to an ex post facto prosecution. A law is ex post facto when applied to offenses occurring before the law becomes effective. State v. Gale Distributors, 349 So.2d 150 (Fla. 1977). As stated in State v. Gale Distributors, supra, at 154:

> The definition of an ex post facto law now universally adopted in this country is: "one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage.

Accord, Green v. State, 238 So.2d 296, 301 (Fla. 1970) (ex post facto to apply a statute prohibiting bail on appeal retroactively).

Even in light of the recent amendment to Section 775.021 (4), respondent could not be subjected to multiple convictions and sentences based on the statute's continued exclusion of lesser included offenses. The amended statute merely adopts the Blockburger-Borges language defining lesser included offenses

and omits the ambiguous "excluding lesser included offenses" language. The only substantive change, if any, in the law is to limit the prohibition against multiple sentences to those offenses which are necessarily lesser included in the greater offense. Thus, under either the applicable unamended version or the newer version of Section 775.021(4), respondent could not be subjected to multiple sentences for trafficking, sale and possession.

It follows that separate sentences for the three offenses are not permitted under the law, as petitioner contends. The question then becomes whether separate convictions are authorized. If double jeopardy bars two prosecutions or trials for "the same offense" it also bars two convictions. The difference between two prosecutions for "the same offense" in successive trials or in one trial is immaterial. The constitutional guarantee against double jeopardy is too substantive and too fundamental to apply only to sentencing following a single trial. The prosecution cannot be permitted to so easily circumvent this constitutional protection by simply joining for one trial multiple charges as to offenses which are essentially the same. The prosecution cannot do in one trial what it is prohibited from doing in two trials.

It seems apparent that multiple convictions for lesser included offenses, even in one prosecution, constitute a form of punishment prohibited by the double jeopardy clause. This

was recognized in Bell v. State, supra, wherein it was held:

> Arguments that multiple convictions in a single trial setting do not produce detrimental effects, and therefore do not punish multiplici-ously, are misplaced unless we are willing to close our eyes to the realities of the criminal justice system. Convictions for lesser included offenses clearly have detri-mental effects on the person convicted.

8 FLW at 200. This Court concluded in Bell that

> based on an appreciation of the history of the policies behind protecting against double jeopardy for the same offense, and motivated by a desire for consistency and fairness, we hold that once it has been established that an offense, whether charged or not, and whether in single or separate proceedings, is a lesser included offense of a greater offense also charged, then the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser included offenses.

Id.

The holding of Bell v. State is dispositive of the instant cause. Under Bell v. State, respondent's convictions for both the sale and possession offenses should have been reversed. Respondent therefore contends that the district court correctly vacated respondent's sentences for sale and possession of cocaine, but erred in affirming the convictions for those offenses. This Court must therefore remand to the District Court of Appeal for entry of an order reversing appellant's convictions for the sale and possession offenses.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests this Court remand the cause to the District Court of Appeal for entry of an order vacating both the convictions and sentences against him for possession and sale of cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Richard Patterson, The Capitol, Tallahassee, Florida; and by mail to Mr. James Ray Rotenberry, #083886, Post Office Box 699-N-38, Sneads, Florida, 32460, this 14th day of November, 1983.

Paula S. Saunders

PAULA S. SAUNDERS
Assistant Public Defender